93-773

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

GEORGE K. PRICE, HARRY L. SCHUMAN and SHARON ROSEN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Truth in Lending Act, which requires disclosure of "the day by which . . . payment must be made to avoid additional finance charges," authorizes a credit card issuer to insert a fictitious payment due date in its monthly statements that is five days earlier than the actual date upon which finance charges will be assessed, thereby inducing card holders to make payments earlier than necessary?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 18, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 4 F.3d 472 (7th Cir. 1993) and is reproduced in the Appendix at pp. App. 1 - App. 7.

The opinion of the United States District Court for the Northern District of Illinois is not reported and is reproduced in the Appendix at pp. App. 9 - App. 15.

JURISDICTION

The Court of Appeals entered judgment on August 18, 1993. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act
15 U.S.C. §1637(b)(9)

Open end consumer credit plans.
Statement required with each billing cycle.

The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

* * *

(9) The day by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

Regulation Z
12 C.F.R. §226.7(j)

Periodic statement.

The creditor shall furnish the consumer with a periodic statement that discloses the following items, to the extent applicable:

* * *

(j) Free ride period. The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration.

STATEMENT OF THE CASE

This case poses an important question under §127(b)(9) of the Truth in Lending Act, 15 U.S.C. §1637(b)(9) (the "Act"), which affects tens of millions of credit card holders across the United States and bank credit card issuers with a credit volume, insofar as pertinent to this case, of tens of billions of dollars annually.

FCC National Bank ("FCC"), a subsidiary of First Chicago Corporation, offers Visa and MasterCard bank credit cards under the name "First Card." Millions of individuals and entities widely disbursed throughout the United States hold First Card accounts.[1]

[1] In 1992, FCC was the nation's fourth largest bank credit card issuer.

The Cardholder Agreement (the "Agreement") between First Card holders and FCC that became effective in April, 1991, provides:

> You will receive a billing statement periodically (normally monthly). Your payment is due at our offices on or before the Payment Due Date shown on your billing statement.

FCC sends a monthly billing statement (the "Statement") to each of its card holders which contains sections showing a "Billing Date" and a "Date Payment Due." The period of time between the billing date and the payment due date, after which interest becomes chargeable against the card holder's outstanding credit balance, is referred to as the "grace period."

Before April, 1991, the Statements that FCC sent to its card holders provided 25 days between the billing date and the payment due date. Beginning in April, 1991, FCC began inserting into the Statements of card holders who routinely paid their credit balances in full each month – including petitioners – a false "Date Payment Due" of only 20 days after the billing date. As a result, petitioners paid their accounts earlier than they otherwise would have.

Calls were made to FCC customer service operators in an attempt to determine why the grace period had been "shortened". Those operators stated that FCC chose to insert an earlier date of only 20 days because it wished to "encourage earlier payment" by its card holders.[2] The

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[2] During oral argument before the Court of Appeals, FCC admitted this and further revealed that it did *not* similarly

Agreement provides that the "Date Payment Due" shown in the Statement is the payment due date. While the petitioners' Statements showed payments due 20 days after the billing date, in fact the actual payment due date remained 25 days after the billing date.

By reason of the falsely stated payment due date, FCC obtained the use of its card holders' funds for about 5 days per month, or about 60 days per year, earlier than it would have if it had advised card holders of the actual payment due date. FCC was able to invest those funds and realize substantial profits at the direct expense of, and damage to, petitioners and other similarly situated card holders.

Petitioners brought a class action, asserting that FCC's practice violates 15 U.S.C. §1637(b)(9), which requires disclosure of the "date by which . . . payment must be made to avoid finance charges." During abbreviated discovery, FCC acknowledged that the 20-day grace period shown on Statements issued after April, 1991, was not the "date by which . . . payment must be made to avoid finance charges" and that payments made within 25 days remained free from finance charges. FCC's counsel also admitted during oral argument before the Court of Appeals that it maintains a "shadow grace period" of 5

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encourage earlier payment from its card holders who financed part of their accounts – i.e., those card holders who did not regularly pay their accounts in full within the grace period. As to those card holders, FCC continued to disclose a payment due date which reflected the actual grace period of 25 days because insertion of a false due date of only 20 days might result in timely payment and the loss of profit from finance charges to FCC.

days by representing a 20-day grace period while retaining an actual grace period of 25 days.

Based upon this and other evidence, the court below found that FCC retains an actual grace period of 25 days. (App. 3). Nevertheless, and inconsistently, the Court of Appeals held that FCC did not violate the statute by disclosing only a 20-day grace period. (App. 4). Thus, FCC continues to show a false and misleading "Date Payment Due" on its Statements, but does so now with the stamp of legality.

The statute clearly and unambiguously requires creditors such as FCC to reveal the *actual* date by which payment must be made to avoid additional finance charges. The decision below to the contrary is so plainly erroneous that this Court might well grant the writ and reverse summarily.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Plainly Erroneous Construction Of The Truth In Lending Act Will Permit All Credit Card Issuers To Deceive Tens Of Millions Of Credit Card Holders Throughout The United States By Inducing Early Payment Of Tens Of Billions Of Dollars Annually.

The decision below is at war with the plain language and purpose of the Truth in Lending Act. The Court of Appeals' interpretation of the Act promotes deception rather than truthful disclosure. That decision also permits other credit card issuers to engage in similar deceptive practices to the detriment of their card holders.

Congress has declared that

> it is the purpose of [the Act] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. (15 U.S.C. §1601(a)).

This Court has applied the Act to effectuate those purposes when creditors failed to accurately disclose what the Act requires. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363-68 (1973). Being remedial, the Act is construed liberally in favor of the consumer. *Cody v. Community Loan Corp. of Richmond County*, 606 F.2d 499, 505, *reh'g denied*, 608 F.2d 1373 (5th Cir. 1979), *cert. denied*, 446 U.S. 988 (1980); *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974).

The court below sanctioned FCC's false and deceptive practice, notwithstanding the clear legislative mandate of accurate disclosure, only by accepting as true FCC's admittedly fictional or "shadow" grace period. Thus, the court stated:

> FCC's practice clearly complies with [§1637(b)(9)]. FCC extends a 20-day grace period to customers, such as the plaintiffs, who routinely pay their bills without incurring a finance charge. There is no dispute that the existence and duration of this grace period is fully disclosed on the billing statements of the affected customers. (App. 4).

However, based upon the court's own opinion, the conclusion that FCC offers a 20-day grace period is plainly erroneous as a matter of law and fact. (App. 2). FCC does *not* "extend[ ] a 20-day grace period" and has conceded that 20 days is not the time within which payment must be made to avoid finance charges. Rather, as the court below recognized, FCC retains "an actual grace period of 25 days." (*See* App. 3). Therefore, it cannot be true that "FCC has satisfied its obligation to disclose the 'period . . . within which[ ] payment must be received [sic] to avoid additional finance charges.' " (App. 4). Because the "grace period" disclosed is 20 days and the actual grace period is 25 days, FCC has violated the Act and the court below erred beyond doubt.

The court below also sought to support its acceptance of FCC's deceptive practice by asserting that FCC "*could*, consistent with the agreement, assess such a [finance] charge as early as the twenty-first day after the billing date." (App. 4) (emphasis added). Regardless of whether FCC could do so, the undisputed fact is that it does not. Its actual grace period remains at 25 days (App. 3).

The court below also misconstrued the second clause of §1637(b)(9) (App. 4). That clause, by its own terms, applies only when the issuer has truthfully stated the actual payment due date. The phrase "after *such date*" in the second clause refers to the date truthfully revealed in accordance with the first clause, i.e., the date by which payment must be made to avoid finance charges. The second clause does not excuse stating the actual payment due date in the first instance but merely allows a creditor to waive finance charges actually incurred on a late payment. That clause is not a license to state a false due date

or pretend to "waive" finance charges that were not incurred. The Court of Appeals' interpretation of the second clause reads the main clause out of the Act.

The clarity of the error in the lower court's decision is matched by the breadth and severity of its impact. In this case, consumers who act on FCC's misrepresentation are deprived of the use of their money for up to 60 days a year by being induced to make payments about 5 days a month earlier than is necessary to avoid finance charges. In 1992, FCC maintained over 5-1/2 million active accounts with a charge volume of almost $18 billion per year. HSN Consultants, Inc., *The Nilson Report* (No. 542, Feb. 1993) (*"Nilson"*).[3]

Both industry and credit card holder association reports indicate that the average portion of credit card charges that are paid on time without incurring finance charges varies from year to year, that over the past five years it has ranged from between 30% and 50%, and that in 1992 that proportion was about 40% of all credit volume. American Bankers Assoc., *1993 Bankcard Industry Report*; Bankcard Holders of America, *Credit Cards: What You Don't Know Can Cost You* (June, 1992). Thus, on average, FCC card holders are deprived of the use of $7.2 billion of their money (40% of $18 billion) for 60 days each year.

Once the decision below becomes known to the industry, it is reasonable to expect that many other bank

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[3] Nilson states that "since 1969" it has been "the industry's leading news and advisory service for credit/debit-card executives."

card issuers will adopt FCC's practice. The largest one, Citibank, already has. In 1992, Citibank had almost 16 million active accounts with charge volume of over $46 billion. *Nilson*. Based upon the 1992 average of 40% of charge volume being paid on time, Citibank's deceptive practice induces early payments of more than $18 billion a year.

But the probable effect of the lower court's ruling is much greater. In 1992, the 100 largest bank credit card issuers in the United States had a total of over 104 million active accounts with charge volume exceeding $248 billion. *Id*. Based on 1992 statistics (*Id*.), approximately $99 billion per year charged by the card holders of the nation's 100 largest issuers would be paid early if all of those issuers adopt FCC's practice.

Even if FCC and Citibank were the only bank card issuers to follow the deceptive practice approved by the court below, the huge financial impact on millions of credit card holders making early payments of tens of billions of dollars annually throughout the country warrants this Court's review.

CONCLUSION

Because the erroneous decision below will have a profound impact on tens of millions of card holders, it is respectfully requested that this Court grant a writ of certiorari and, either summarily or in due course, reverse the judgment below.

Respectfully submitted,

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November 12, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-3106 & 92-3261
GEORGE K. PRICE, HARRY L. SCHUMAN
and SHARON ROSEN,

Plaintiffs-Appellants-
Cross-Appellees,

v.

FCC NATIONAL BANK,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2164 – **John A. Nordberg,** *Judge*

ARGUED APRIL 6, 1993* – REARGUED JUNE 2, 1993 –
DECIDED AUGUST 18, 1993

Before CUDAHY, RIPPLE and KANNE, *Circuit Judges.*

CUDAHY, Circuit Judge. FCC National Bank (FCC) offers Visa and MasterCard bank credit cards under the name "First Card." The privileges and obligations of

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* This case was originally argued before a panel consisting of Circuit Judges Cummings, Cudahy and Posner. Following oral argument on April 6, 1993, Circuit Judges Cummings and Posner recused themselves and the case was reassigned to the present panel.

holding a First Card, which the plaintiffs here all have, are set forth in the cardholder agreement (the agreement). Before April 1991, the agreement provided that all cardholders had 25 days after the receipt of a billing statement to pay any outstanding balance without incurring a finance charge. This so-called "grace period" was fully disclosed on the plaintiffs' billing statements. The agreement was amended on April 1, 1991, to provide that a finance charge would accrue unless payment was made on or before the "payment due date" printed on the billing statement. Thus, after the April 1991 amendment, the grace period was the time between the billing date and the "payment due date."

After April 1, the plaintiffs' billing statements reflected a grace period of 20 days instead of the 25 days formerly disclosed. The plaintiffs called FCC's customer service department to find out why their grace period had been shortened. They maintain that FCC's customer service operators told them that an actual 25-day grace period still applied but that the 20-day period was indicated on the bill in order to encourage early payment. FCC does not deny any of this. At oral argument, counsel explained that extensive experience had led FCC to the conclusion that customers who once paid their bills before incurring a finance charge were inclined to continue doing so month after month. But because procrastination is ingrained in the human condition, some of these customers would nevertheless wait until the twenty-third or twenty-fourth day of the 25-day grace period to mail their checks. If, as was often the case, the checks arrived at FCC after the grace period, FCC

assessed a finance charge, as it was entitled to do pursuant to the agreement. This assessment greatly irritated these "prompt-paying" customers, since they had intended all along to pay within the grace period. To help alleviate this problem, FCC, after properly amending the agreement, began showing a 20-day grace period on the billing statements of those customers who routinely pay without incurring a finance charge, while retaining an actual grace period of 25-days. FCC reasoned that even if the customers paid at the end of the 20-day grace period shown on the billing statement their checks would still arrive before the expiration of the 25-day grace period.

The plaintiffs contend, in count I of their complaint, that FCC's practices, which admittedly tend to encourage payment a day or so earlier than is actually required to avoid the imposition of finance charges, are contrary to the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1700, commonly referred to as the Truth in Lending Act. The plaintiffs also allege that the practice violates various provisions of Illinois law. Finally, the plaintiffs request certification of a class, with themselves as class representatives, consisting of all holders of First Cards to whom FCC had, on their billing statements, represented a 20-day grace period. The district court dismissed count I pursuant to FCC's motion to dismiss for failure to state a claim upon which relief could be granted. In the absence of a viable claim under federal law, the district court dismissed plaintiffs' state-law claims for want of jurisdiction. In a separate opinion, the district court certified the requested class pursuant to Fed. R. Civ. P. 23(b)(3) but not, as the plaintiffs had also requested, pursuant to Rule 23(b)(2). Both parties appeal. We affirm the dismissal of

all counts of the plaintiffs' complaint and dismiss as moot the appeals pertaining to class certification.

Section 127(b)(9) of the Truth in Lending Act provides, in pertinent part, that issuers of credit cards, such as FCC, disclose in each periodic billing statement to its customers

> [t]he date by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the expiration of such period.

15 U.S.C. § 1637(b)(9). FCC's practice clearly complies with this provision. FCC extends a 20-day grace period to customers, such as the plaintiffs, who routinely pay their bills without incurring a finance charge. There is no dispute that the existence and duration of this grace period is fully disclosed on the billing statements of the affected customers. Thus, FCC has satisfied its obligation to disclose "the period . . . within which[ ] payment must be received to avoid additional finance charges."

FCC also has elected not to impose a finance charge on these customers' accounts unless payment is received more than 25 days past the billing date, although presumably it could, consistent with the agreement, assess such a charge as early as the twenty-first day after the billing date. The "except" clause in § 1637(b)(9) expressly permits such a policy of forbearance. Moreover, the statute permits FCC to maintain such a policy without disclosure. FCC's practice, therefore, cannot be said to run afoul of the Truth in Lending Act.

The plaintiffs contend that the except clause permits "*waiver* of finance charges on payments received after the end of [the] grace period." Appellant's Br. at 20 (emphasis supplied). From this assumption, they are able to argue that the first clause of § 1673(b)(9) requires a creditor such as FCC to disclose when it *actually* imposes a finance charge on its customers' unpaid balances because only finance charges that have in fact been imposed can be waived. Under this interpretation, creditors would have to assess a finance charge once the grace period disclosed on the billing statement has expired, although they could later waive it. But, as the district court observed, this view directly contradicts the language of § 1673(b)(9)'s except clause that permits a creditor to *elect not to impose* a finance charge even though payment is received after the "payment due date" has passed. *Price v. FCC Nat'l Bank*, No. 92 C 2164, slip op. at 4-5 (Aug. 18, 1992 N.D. Ill.). FCC could impose a finance charge on the plaintiffs' unpaid balances 21 days after the billing date that appears on their monthly statements. FCC routinely, indeed, as a matter of policy, chooses not to do so. The clear and unambiguous language authorizes precisely this sort of practice.

The plaintiffs also contend that the except clause should be read restrictively to permit FCC to elect not to impose finance charges only on a case-by-case basis. Accordingly, the plaintiffs maintain, FCC may use the except clause only to avoid assessing finance charges that are the result of (1) its own mishandling of timely payments, (2) unexpected late mail delivery or (3) some (unspecified) "fault of the cardholder." Appellant's Br. at 25. We reject these contentions. First, 15 U.S.C. § 1666c

forbids a creditor from imposing a finance charge if payment was properly and timely made but not credited to the cardholders account. Accordingly, since finance charges may never accrue as the result of a creditor's mishandling of timely payments, a creditor will never have the opportunity to *elect* not to impose a finance charge under such circumstances. Second, none of the language in § 1673(b)(9)'s except clause indicates that the decision not to impose a finance charge must be made on an ad hoc basis. The plaintiffs' proposed construction, which permits only an ad hoc application of the except clause, creates the possibility that similarly situated cardholders will be treated differently, i.e., one will be assessed a finance charge and one will not. Such dissimilar treatment may be the sort of "unfair credit billing . . . practice[ ]" that the Truth in Lending Act sought to eliminate. 15 U.S.C. § 1601(a).

We conclude that FCC may maintain, consistent with the Truth in Lending Act, a generally applicable, undisclosed policy of not imposing finance charges on customers unpaid balances for a fixed period of time beyond a properly disclosed grace period. Accordingly, the district court did not err in dismissing count I of the plaintiffs' complaint. Nor did the district court err in dismissing the plaintiffs' state-law claims, since the only federal claim over which it had jurisdiction was properly dismissed. 28 U.S.C. § 1367(c)(1). Finally, because we hold that the district court properly dismissed the plaintiffs' entire complaint, the appeals pertaining to class certification are moot and are thus dismissed for want of jurisdiction.

AFFIRMED IN PART AND DISMISSED IN PART

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT WITH ORAL ARGUMENT

Date: August 18, 1993

BEFORE: **Honorable** Richard D. Cudahy, Circuit Judge

Honorable Kenneth F. Ripple, Circuit Judge

Honorable Michael S. Kanne, Circuit Judge

Nos. 92-3106 and 92-3261

GEORGE K. PRICE, HARRY L. SCHUMAN
and SHARON ROSEN,
Plaintiffs - Appellants
Cross - Appellees

v.

FCC NATIONAL BANK,
Defendant - Appellee
Cross - Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 92 C 2164, John A. Nordberg, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, with costs, in part and DISMISSED in part for lack of jurisdiction, in accordance with the decision of this court entered this date.

(1061-051993)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE K. PRICE, HARRY L. SCHUMAN and SHARON ROSEN, Plaintiffs,	)	
v.	)	No. 92 C 2164
FCC NATIONAL BANK, Defendant.	)	

MEMORANDUM OPINION AND ORDER

STATEMENT OF FACTS

Plaintiffs George Price, Harry Schuman and Sharon Rosen have all been holders of either regular or mileage plus "First Card" credit cards, issued by defendant FCC National Bank, since before April 1991. Plaintiffs allege that their original cardholder agreements provides that they have twenty-five days after the receipt of any billing statement to pay the outstanding balance on the statement before incurring finance charges. After April, 1991, plaintiffs' billing statements reflected a payment period of only twenty days. This change was due to an amendment to the cardholder agreement by defendant providing that finance charges would not accrue between the "billing date" and the "date payment due" shown on the statement. This time period varies from twenty to twenty-five days for each cardholder. As a practical matter defendant did not begin to assess finance charges until 25 days after the billing date, providing a "shadow grace period" of up to five days.

Plaintiffs do not recall receiving notice of any amendments concerning billing policy from defendant. Plaintiffs further claim that a customer service operator of defendant told them that the twenty-five day payment period still applied, and the twenty day period was printed on billing statements to encourage early payment.

Plaintiffs allege this practice deprives them of five days worth of control over funds used to pay their outstanding balances for a particular month. Count I of their complaint alleges defendant has violated the Consumer Credit Protection Act's disclosure requirements for open end consumer credit plans. 15 U.S.C. § 1637(b)(9). Utilizing the court's supplemental jurisdiction, the complaint also alleges violations of Illinois' consumer credit protection act, Ill. Rev. Stat. ch. 17, para. 6009(a)(3), the Illinois Consumer Fraud and Deceptive Practices Act, Ill. Rev. Stat. ch. 121-1/2, para. 262, and common law claims for fraud and breach of contract. Plaintiffs have asked for injunctive relief, actual and exemplary damages, pre and postjudgment interest, and costs and attorneys' fees. Plaintiffs have also asked the court to certify a plaintiff class, with themselves as class representatives, consisting of all cardholders of First Card between April 1, 1991 and the present to whom defendant represented a twenty day payment period. Before the court is defendant's motion to dismiss.

ANALYSIS

Count I of the complaint alleges that because the stated date payment is due for a particular billing statement is actually before the date defendant will begin to

assess finance charges for late payment, defendant's billing statements are in violation of the disclosure requirements of § 1637. This section requires that every cyclical billing statement set forth:

> The date by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

15 U.S.C. § 1637(b)(9). Plaintiffs have focused on the word "must" in the first clause of this section, arguing that, since they are not actually subject to finance charges until the expiration of defendant's shadow grace period, this is the date which must be disclosed in defendant's billing statement. Defendant focuses on the second clause of the section, arguing its clear language indicates defendant may maintain a longer grace period than the billing statement provides without telling its cardholders.

Both sides argue that the language of this paragraph is unambiguous, and no resort to the legislative history is necessary. Both sides also argue that to give the appropriate clause the construction its opponent favors would render the other clause of the section meaningless. Defendant's argument is the more persuasive. A court should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous. *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983). Under plaintiffs' construction of the section, forbearance in collection of finance charges effectively moves the date payment is due to the date it is actually

made. The first clause requires that this information be contained in the billing statement. If defendant must reveal its decision not to assess finance charges, then it is impossible to do so without disclosure, rendering the second clause meaningless.

Plaintiffs make two attempts to reconcile the second clause with their interpretation of the section. The first attempt points to the language that defendant may not impose finance charges "if payment is received after such date or the termination of such period." Plaintiffs contend this language indicates the second clause of the section permits a creditor to extend the grace period for payment only if a late payment has actually occurred. In other words, defendant may not have a preexisting grace period anticipating late payment, but must decide whether or not to impose finance charges on delinquent payments on a case by case basis. It is hard fathom what Congress' reasoning would have been for such a policy, which would result in unilateral decisions to impose some similarly situated cardholders, but not others. It is certainly not in compliance with the professed intent of the Act, to assure a meaningful disclosure of credit terms and protect consumers against unfair and inaccurate credit billing practices. 15 U.S.C. § 1601(a).

Further, under plaintiffs' interpretation of § 1637(b)(9), once the date payment is due has passed, finance charges must be assessed. If the creditor does not impose finance charges, it is because it has moved the due date. Yet the language of the second clause states the creditor may elect not to "impose" such charges, it does not use language such as erase, negate, remit, or any other verb indicating the charges already exist.

Second, plaintiffs contend that the second clause of § 1637(b)(9) must be construed with § 1666C, enacted simultaneously when the Act was amended in 1974. Section 1666C prohibits the imposition of finance charges if payment was properly and timely made, but not credited. Thus the only purpose of § 1637(b)(9) is to allow creditors a mechanism to avoid assessing finance charges due their own delays in handling timely payments. This is an insupportable construction of the Act. Section 1666C provides that such a mechanism shall be provided by regulations promulgated by the Federal Reserve Board, not by another section of the Act. This regulatory mechanism is in place. 12 C.F.R. § 226.10(c). Finally, if the second clause of § 1637(b)(9) only implements the requirements of § 1666C, why may the creditor be able to utilize it "at his election?"

Plaintiffs' argument that defendant's interpretation of § 1637(b)(9) renders its disclosure requirements meaningless is based on an illusion. The purpose of the Act is to promote informed choices of credit vehicles by consumers, not to regulate credit terms. Defendant could have amended the cardholder agreement to require payment within twenty days, or instantaneously for that matter, and rigorously held to those dates. Plaintiffs have conceded that notice of the amendment is not an issue for these purposes. In such a situation plaintiffs would have to pay within whatever time period defendant required, or pick a new credit card company. Any injury due to the early payment of plaintiffs' bills would be nonexistent, because plaintiffs would be obligated to pay at that time under the cardholder agreement. By extending the time for payment, defendant is helping, not injuring plaintiffs.

Plaintiffs' claim is essentially based on the notion that they still are entitled to a twenty-five day payment period, and that defendant is tricking them into paying before they have to. The payment period on plaintiffs' cardholder agreement is no longer twenty-five days, it is twenty days. Defendant's shadow grace period is a permissible practice under § 1637(b)(9). Count I of the complaint is therefore dismissed.

With the dismissal of Count I, the basis of the court's original jurisdiction has been removed from the case.[1] All that remains are plaintiffs' state law claims, before the court solely on the basis of supplemental jurisdiction. 28 U.S.C. § 1367(a). Under the supplemental jurisdiction statute, the court may decline to exercise supplemental jurisdiction over a claim if all claims over which it had original jurisdiction have been dismissed. 28 U.S.C. § 1367(c)(3). It is generally considered fair to decline supplemental jurisdiction over a state law claim if dismissal of the claims creating original jurisdiction takes

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[1] Plaintiff's claim to original jurisdiction was based on federal question jurisdiction. 28 U.S.C. § 1331. With the dismissal of their Truth in Lending Act claim, plaintiffs lack another basis of asserting federal subject matter jurisdiction, including diversity jurisdiction. Even if plaintiffs have complete diversity of citizenship with defendant, it is apparent to a legal certainty that plaintiffs' individual claims will be less than the jurisdictional minimum of $50,000.00. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). As the court has determined in its opinion deciding plaintiffs' motion for class certification, plaintiffs qualify as class under Rule 23(b)(3). Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, or be dismissed. *Zahn v. International Paper*, 414 U.S. 291, 301 (1973).

place early in the case. 28 U.S.C.A. § 1367, practice commentary; *Procopio v. Johnson*, 785 F. Supp. 1317, 1320 (N.D. Ill. 1992). The court therefore declines jurisdiction over the remainder of plaintiffs' case.

Finally, plaintiffs claim that is improper for the court to rule on the merits of their complaint before deciding their motion for class certification, citing *Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir. 1992). Plaintiffs ignore the rationale of *Koch*, that a defendant is entitled to the benefits of class certification as much as the plaintiff. *Id.* It is perfectly appropriate to decide a motion for class certification simultaneously with a motion to dismiss, which the court has done in a companion opinion.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. Count I of the complaint is dismissed with prejudice. The remainder of the complaint is dismissed without prejudice for lack of subject matter jurisdiction.[2]

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

DATED: August 18, 1992

[2] Plaintiffs' motion for a preliminary injunction, filed just prior to the issuance of this opinion, is denied as moot.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

GEORGE K. PRICE, HARRY L. SCHUMAN and SHARON ROSEN

v. CASE NUMBER: 92 C 2164

FCC NATIONAL BANK

[ ] **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

[X] **Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss is granted. Count I of the complaint is dismissed with prejudice. The remainder of the complaint is dismissed without prejudice for lack of subject matter jurisdiction. Court grants plaintiffs' class as certifiable under rule 23(b)(3).

AUGUST 18, 1992
Date

H. STUART CUNNINGHAM
Clerk

/s/ E. Pousbach
(By) Deputy Clerk

Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

No. 93-773

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GEORGE K. PRICE, HARRY L. SCHUMAN
and SHARON ROSEN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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December 15, 1993

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QUESTION PRESENTED

Whether the Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.* (commonly, and hereinafter, referred to as the "Truth In Lending Act"), permits a credit card issuer to tell its cardholders that in order to avoid finance charges payments must be received within 20 days when it has an undisclosed policy of assessing finance charges only if payments are not received within 25 days?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

FCC National Bank ("FCC") issues First Card Visa and Mastercard credit cards.[1] Pursuant to the Agreement between FCC and its cardholders (the "Agreement"), payments are due on or before the Payment Due Date

[1] Pursuant to Supreme Court Rule 29.1, FCC states that it is a wholly-owned subsidiary of First Chicago Corporation.

shown on the billing statement sent to the cardholder monthly. If the bill is not paid in full on or before the Payment Due Date, according to the Agreement, finance charges are charged beginning on the date the purchases were made. If the bill is paid in full on or before the Payment Due Date, the Agreement provides that no finance charges are charged.[2]

The Payment Due Date on each billing statement varies from 20 to 25 days from the billing date. The Payment Due Date for cardholders who have not paid their bills in full ("Partial Paying Cardholders") is 25 days from the billing date; the Payment Due Date for cardholders who have paid their bills in full ("Full Paying Cardholders") is 20 days from the billing date. For the Full Paying Cardholder finance charges are assessed only if payment is not received within 25 days; in other words, there is a five day shadow grace period for Full Paying Cardholders.

The reason for this shadow grace period is not to harm the Full Paying Cardholders, but rather to benefit both them and FCC. Full Paying Cardholders are those who want to avoid finance charges. FCC's practice protects these cardholders from their own inadvertence in mailing their payments a few days late or the vagaries of mail delivery. The practice also greatly reduces cardholder complaints and increases cardholder satisfaction, whilst simultaneously encouraging cardholders to make sure their payments are received timely. For Partial Paying Cardholders, the number of days used in calculating the

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[2] Petitioners refer to this time period during which interest is not charged as the "grace period." Petition For Writ Of Certiorari ("Petition") at 4.

Payment Due Date does not matter because interest is charged from the date of their purchases.[3]

FCC's shadow grace period practice is specifically authorized by the Truth in Lending Act, 15 U.S.C. §1637-(b)(9), and Regulation Z, 12 C.F.R. §226.7(j), promulgated thereunder, and is consistent with the interpretations and opinions of the Federal Reserve Board (the "Board"), the agency charged with the interpretation of the Truth In Lending Act. For this reason the United States District Court for the Northern District of Illinois granted FCC's motion to dismiss and the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

REASONS FOR DENYING THE WRIT

I.
THE DECISION BELOW CORRECTLY INTERPRETED THE TRUTH IN LENDING ACT AND REGULATION Z

At issue here is the proper interpretation of section 1637(b)(9) of the Truth In Lending Act and section 226.7(j) of Regulation Z. FCC interprets the Truth In Lending Act and Regulation Z as permitting an undisclosed five day grace period as a matter of business practice. Petitioners interpret it as mandating disclosure of this five day grace period.

In relevant part, section 1637(b)(9) requires a creditor to reveal in its periodic billing statements:

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[3] Contrary to Petitioners' assertion, Petition at 4-5 n.2, FCC does not tell Partial Paying Cardholders they have 25 days to pay their bills without incurring finance charges in order to discourage timely payment.

> The day by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

As both the Court of Appeals and the District Court held, section 1637(b)(9) is clear. Section 1637(b)(9) sets forth a general rule in the first clause and an exception to the general rule in the second clause. The general rule requires a credit card issuer to reveal in its periodic billing statements the contractual date on which its cardholders' payments are due. The exception allows the credit card issuer, without disclosure, to forebear from imposing contractually permissible finance charges if its cardholders' payments are received after their contractual due dates.

FCC's challenged practice complies with section 1637(b)(9).[4] FCC informs cardholders who have previously timely paid their bills in full, the Full Paying Cardholders, that they have 20 days within which to pay their bills. Thereafter, FCC unilaterally, and without disclosure, forbears from actually imposing contractually permissible interest charges unless their payments are received more than five days after their due dates.

To reach their contrary construction, Petitioners initially posit that the general rule in the first clause of section 1637(b)(9) does not require a credit card issuer to reveal in its periodic billing statements the date on

---

[4] It also complies with Regulation Z which provides in pertinent part: "a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration."

which its cardholders' payments are contractually due. Rather, Petitioners argue, it requires the issuer to reveal the date on which it will actually impose finance charges, taking into account all undisclosed and internal forbearance policies maintained by the issuer. Having construed the first clause so illogically, Petitioners then flounder in their attempt to construe the exception in the second clause of section 1637(b)(9) in a way that makes any sense at all. The construction offered by them is that the second clause only "allows a creditor to waive finance charges actually incurred on a late payment." Petition at 8. Petitioners' construction cannot be correct because under it the exception to the general rule ceases to exist and it is at odds with the plain language of section 1637(b)(9).

As Petitioners concede, under their construction a credit card issuer may only decide to forbear from imposing contractually permissible interest *after* its cardholders' Payment Due Dates have passed. Petition at 8. Yet section 1637(b)(9) states that the "creditor may, at his election and without disclosure, impose no additional finance charge[.]" Impose is the present active form of the verb. Any decision *not to impose* finance charges must necessarily be made prior to the imposition of those finance charges. Petitioners' construction, which requires the reversal of a finance charge previously *imposed*, cannot be correct.

Moreover, under Petitioners' construction, there is never a circumstance under which the card issuer can decide not to impose a finance charge without disclosing its decision. Section 1637(b)(9) allows a credit card issuer not to impose finance charges *without disclosure*. If a credit card issuer may only "waive" previously imposed finance charges in response to cardholder com-

plaints, it is impossible to do so without disclosure. Obviously, the "waiver" must be disclosed to the cardholder. If the card issuer has to tell the cardholder finance charges will be assessed after a certain date, then the card issuer cannot make an undisclosed decision not to impose a finance charge after that date.

Section 1637(b)(9) contains a general rule and an exception. By containing an exception, section 1637-(b)(9) recognizes there will be a situation where disclosure will not be made. Thus, the Court of Appeals correctly interpreted section 1637(b)(9) of the Truth In Lending Act, and the petition for a writ of certiorari should be denied.

II.

DENYING THE WRIT WILL HAVE LITTLE EFFECT AND WILL NOT HARM CONSUMERS

Petitioners also argue that the petition for a writ of certiorari should be granted because once the "decision below becomes known to the industry, it is reasonable to expect that many other bank card issuers will adopt FCC's practice." Petition at 9-10. Central to Petitioners' thesis is that the decision below represents a new interpretation of the Truth In Lending Act. What Petitioners ignore is that the practice complained of is the industry standard, and has been, with the approval of the Board, since at least 1971.

In 1971, section 1637(b)(9) did not contain the exception in the second clause. Instead, it simply contained the general rule in the first clause which required the creditor to reveal: "the date by which, or the period (if any) within which, payment must be made to avoid additional finance charges." In response to a letter asking for clarification regarding whether section 1637(b)(9)

permitted the then widespread industry practice whereby credit card issuers granted their cardholders an undisclosed period within which to pay credit card bills, the Board, in permitting the practice, responded:

> In your letter of April 19, 1971, you inquired whether it would be permissible in an open end credit plan, to disclose under §226.7(b)(9) of Regulation Z the fact that payment in full must be made within 25 days in order to avoid finance charges, when, in reality, the creditor allows a full month from the close of the billing cycle before imposing finance charges.
>
> We believe that it is permissible under Regulation Z to allow an additional grace period beyond the date specified in which to receive payments before a finance charge is assessed. Consequently, the plan you propose would be permissible.

Excerpt from Board Interpretive Letter No. 475, dated May 10, 1971 by Griffith L. Garwood, Attorney, CCH Consumer Credit Guide, ¶ 30,675.

The Truth In Lending Act was amended in 1974. At that time, the exception to the general rule in the second clause was added to section 1637(b)(9). As is required, the Board summarized the amendment in the Federal Register. This summary, which sets forth an example of how section 1637(b)(9) works, says:

> For example, a creditor may disclose that the customer has 25 days in which to pay his account in full to avoid additional finance charges but as a matter of business practice allows [sic] the customer a full 30 days – the beginning of the next billing cycle – to pay the account without the imposition of additional finance charges.

40 Fed. Reg. 1717 (January 8, 1975). Except for the number of days used, this example is exactly the same as FCC's practice.

For twenty-three years the practice such as the one engaged in by FCC has been publicly approved by the agency responsible for administering The Truth In Lending Act. The decision below, which only affirms that policy, is hardly likely to cause much of a stir.[5]

Should the Court of Appeals' judgment be reversed, cardholders will be disadvantaged. It must be remembered that what Petitioners seek to eliminate is FCC's grant of a gratuitous forbearance period. The Court's adoption of Petitioners' interpretation simply means that FCC must eliminate its free forbearance policy and that FCC *must* charge its cardholders interest if their payments are received as little as a day late, unless a cardholder specifically calls up and complains. As the District Court observed, dismissing Petitioners' claim: "[i]t is hard to fathom what Congress' reasoning would have been for such a policy[.]" Petition at Appendix 12.

---

[5]The Board's interpretation of section 1637(b)(9) is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, contemporaneous administrative construction of a statute is persuasive evidence of its meaning. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978).

CONCLUSION

The Court of Appeals correctly interpreted the plain language of The Truth In Lending Act. That decision is consistent not only with the purposes behind the Truth In Lending Act but also with the long standing interpretations of the Federal Reserve Board, the agency charged with administering The Truth In Lending Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF

The assertion of FCC National Bank ("FCC") that the purpose of its deception is to protect prompt-paying card holders from themselves (Brief in Opposition at p. 2) is patently disingenuous. By instructing card holders, for example, to "mail payment by . . . " *and* disclosing the correct payment due date as required by the Truth in Lending Act, as many creditors do, FCC could truly benefit its card holders. That it has fought so hard to avoid doing so clearly indicates who receives the benefit of the current policy.

FCC is also incorrect when it asserts, without any factual basis in the record, that its deceptive practice "is

the industry standard, and has been, with the approval of the [Federal Reserve] Board, since at least 1971" (Brief in Opposition at p. 6). FCC relies upon a May 10, 1971 Federal Reserve Board (the "Board") staff interpretive letter to support that argument. However, the content of that letter was neither reviewed nor approved by the Board itself. Moreover, in 1982, the Board explicitly repealed all staff interpretations, including the 1971 letter upon which defendant relies. Amendments to Regulation Z, 46 Fed.Reg. 20,892 (1981).

FCC argues that this Court should deny certiorari because FCC has adopted the best available practice in conformity with the law to meet what it asserts is the difficult problem of card holders who intend to pay their bills on time, but whose payments inadvertently arrive late. FCC is wrong; its deceptive practice is neither the best available nor is it permitted by the Truth in Lending Act (the "Act").

Respectfully submitted,

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